

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GERALD L. EVANS)	
Claimant)	
V.)	Docket No. 250,980
)	
FARMLAND FOODS, INC.)	
Self-Insured Respondent)	

ORDER

Respondent requested review of the May 3, 2013 review and modification Award. The Board heard oral argument on September 20, 2013. Robert Lee, of Wichita, Kansas, appeared for claimant. Matthew Schaefer, of Wichita, Kansas, appeared for respondent.

The review and modification Award indicated claimant was permanently and totally disabled as of August 6, 2012. A second issue concerned respondent's request for reimbursement from the Kansas Workers Compensation Fund (Fund), due to respondent having paid for Aciphex, a medication claimant was taking for reasons unrelated to his injury. The Award indicated this second issue was not the subject of the review and modification hearing and not properly before the court.

The Board has considered the record. In addition to the record listed in the review and modification Award, the record further consists of the evidence identified in the underlying December 7, 2001 Award, the parties' October 8, 2001 stipulation concerning the impairment rating assigned to claimant by Dr. Alexander and the parties' December 28, 2012 stipulation concerning claimant's Aciphex medication. Respondent paid \$25,459.18 for claimant's Aciphex beginning December 21, 2005 through November 25, 2012.¹

Claimant indicated in his brief that the review and modification Award correctly concluded that the court lacked jurisdiction to address the Aciphex overpayment issue. However, at oral argument, claimant indicated he was indifferent as to how the Board might decide such issue. As such, claimant is not actively disputing respondent's arguments on this issue. Respondent acknowledged at oral argument that the Board lacks authority to order reimbursement through the Fund, but may find that an overpayment occurred.

The parties agreed at oral argument that if the Board finds claimant to be permanently and totally disabled, the actual and effective date of his becoming permanently and totally disabled is August 6, 2012.

¹ See Stipulation (filed Dec. 28, 2012).

ISSUES

Respondent argues claimant is not entitled to review and modification because his condition has not changed as required by case law interpreting K.S.A. 44-528 (Furse 1993). Respondent also argues claimant is capable of substantial and gainful employment and is not permanently and totally disabled. Should the Board find claimant is permanently and totally disabled, respondent asserts benefits should not commence until August 6, 2012, when Dr. Robl indicated claimant was permanently and totally disabled and essentially and realistically unemployable. Additionally, respondent contends the Board has jurisdiction to review the issue of reimbursement related to the Aciphex medication. Respondent requests the review and modification Award be reversed, and the Board conclude respondent paid for compensation – Aciphex – for which he was not entitled.

Claimant maintains the review and modification Award should be affirmed. Claimant asserts he is permanently and totally disabled.

The issues for the Board's review are:

- (1) Is claimant entitled to receive permanent total disability benefits based on review and modification of the December 7, 2001 Award?
- (2) Did respondent, voluntarily or by court order, provide claimant with compensation for which he was not entitled or that should be totally disallowed?

FINDINGS OF FACT

Claimant accidentally injured his low back on November 4, 1999. At that time, claimant was a 44 year-old male with a GED, but no formal vocational or technical training. His employment history demonstrated physical work, consisting of him being a maintenance mechanic and performing carpentry/construction work.

On account of his injury, claimant was given restrictions against working over 40 hours per week or eight hours in a day, no lifting over 30 pounds, standing for no more than four hours, sitting no more than four hours, no bending, squatting, twisting, climbing, pushing, pulling or reaching overhead more than occasionally and no work in a cold or refrigerated environment. Respondent was able to provide claimant accommodated work until May 18, 2001. Claimant applied for and received unemployment benefits, asserting that he was ready, willing and able to work. He also applied for over 70 jobs, to no avail.

A human resources consultant, Jerry Hardin, testified on September 25, 2001. Mr. Hardin testified that claimant could earn \$300 per week based on being paid \$7.50 per hour for 40 hours. Mr. Hardin did not testify that claimant was essentially and realistically unemployable or permanently and totally disabled.

The medical evidence indicated claimant had a 10% impairment to the body as a whole for his back injury, as opined by Phillip Mills, M.D., and a 10-12% psychological impairment based on deficits in concentration, persistence and pace, along with problems adapting to stress, as opined by C. William Alexander, Ph.D. Dr. Alexander provided claimant pain management until having a heart attack at a time not identified in the record.

The initial Award was entered on December 7, 2001. Claimant was awarded an 87.5% work disability based on 65% task loss and 100% wage loss,² not to exceed \$100,000 in permanent partial general (work) disability benefits. Prior to the Award, claimant was not asserting entitlement to permanent total disability benefits. There was no evidence at the time of the Award that claimant was permanently and totally disabled.

On February 15, 2002, the administrative law judge ordered that David Robl, M.D., claimant's primary care physician, be authorized to provide conservative medical treatment. Subsequent to the initial Award, Dr. Robl prescribed various medication, including Aciphex.

On August 22, 2012, claimant filed an Application for Review and Modification, alleging he was permanently and totally disabled.

Claimant testified on November 8, 2012. He was 57 years-old and had not worked subsequent to the December 7, 2001 Award. He receives social security disability benefits. He testified that he had "gotten a lot worse."³ He also admitted the same pain complaints as when he was seen by Dr. Mills in 2001. He testified that he cannot work eight hours a day, five days a week. He noted that his pain medication, muscle relaxers and anxiety medication negatively affect his thought process and memory. He reminds himself of what he needs to do by relying on Post-it® notes.

A normal day for claimant consists of waking around 7:00 a.m. He watches television and does small craft projects for about two hours. He takes a nap for 30 minutes to an hour, stays up until 2:30 or 3:00 p.m., and takes a second nap. Claimant has difficulty sleeping or getting comfortable because of back and left leg pain. Claimant testified he would not be a reliable employee because he gets sleepy, cannot sit for long durations, needs to lay down and his medication sometimes affects his ability to function.

Claimant testified that Dr. Robl ordered him a cane and a walker in July 2010. He testified that he cannot walk without assistance, using a cane on halfway good days and a walker on bad days. Once a week, claimant drives to the home of a wheelchair bound individual and picks him up to get coffee and perform informal pain management by discussing their medication. Claimant still performs activities of daily living such as cooking, personal hygiene and yard maintenance.

² These 65% and 100% figures, added together and divided by two, equals 82.5%.

³ R.M.H. Trans. at 7.

Dr. Robl, claimant's primary care physician since 1983, testified on November 14, 2012. Dr. Robl diagnosed claimant with degenerative disk disease and a failed back that were "obviously . . . increasing problems"⁴ over the years. Due to claimant's progressive worsening, Dr. Robl prescribed him a cane and a walker in July 2010.

Dr. Robl provided treatment by referring claimant out for epidural steroid injections, physical therapy and decompression therapy. Claimant could not count how many epidural shots he had. Dr. Robl also prescribed Lortab (a pain reliever), Skelaxin (a muscle relaxant), Tramadol (a pain reliever), Trazodone (as a sleep aid) and Aciphex (a proton pump inhibitor used to treat acid/ulcer type problems). Dr. Robl testified that the Aciphex was unrelated to claimant's work injury.

It was Dr. Robl's opinion that claimant's condition has remained unchanged since February 2001, other than perhaps having gotten worse.⁵ Dr. Robl also testified that claimant's condition has not changed at all, "[o]ther than with the progression over time"⁶ and increased degenerative changes. Dr. Robl completed paperwork on a yearly basis for Boston Mutual Life Insurance Company and consistently maintained that claimant is disabled from performing "any occupation."⁷ Dr. Robl believed claimant would be unable to work full-time because sitting, standing or walking for an extended period of time would cause back pain.⁸ He noted that claimant's back pain precluded physical labor.

In a letter dated August 6, 2012, Dr. Robl stated:

[Claimant] has a workman's compensation injury that will be a lifetime disability. He is permanently and totally disabled. We have followed [claimant] for over ten years for this. This is a long standing failed back which has remained stable but will not ever resolve. He is essentially and realistically unemployable.⁹

Dr. Robl also testified that claimant was essentially and realistically unemployable. He admitted, "I suppose you could find some job that he could do, but, boy, it would be difficult for him to maintain a job where he had to show up every day and had to function."¹⁰

⁴ Robl Depo. at 6.

⁵ *Id.* at 24.

⁶ *Id.* at 26.

⁷ *Id.*, Ex. 2.

⁸ *Id.* at 8-9, 26-27.

⁹ *Id.*, Ex. 1.

¹⁰ *Id.* at 27.

Dr. Barrett testified on February 19, 2013. Claimant was examined and treated by Dr. Barrett on five occasions from November 1, 2010 through February 16, 2011.¹¹ Dr. Barrett's initial impression was that claimant had chronic lower back pain with a recent flare-up of symptoms and associated numbness in his left lower extremity. Dr. Barrett obtained x-rays and reviewed a lumbar MRI that revealed a broad-based protrusion at L5 with impingement on the S1 nerve root, in addition to moderate stenosis. Dr. Barrett provided decompressive treatment or traction with a physical therapist. When treatment failed to provide continued relief, Dr. Barrett recommended the possibility of surgery and additional epidural steroid injections. Claimant was not interested in surgery, but wanted continued pain management with Dr. Robl. As a result, Dr. Barrett released claimant from her care and recommended that Dr. Robl continue to provide treatment.

On December 3, 2012, claimant returned to Dr. Barrett to determine whether he was capable of working and for her to provide restrictions. Dr. Barrett reported:

After reviewing [claimant's] clinical findings and review of MRI from 2010, I do believe that [claimant] could function within sedentary light duties. He will need the flexibility to move around as tolerated since [it] will be difficult for him to maintain any prolonged position. My main concern with [claimant] for long term restrictions would be having a job that allows him flexibility to move around and no repetitive bending and twisting type activity. He was working previously as a maintenance mechanic. It is not feasible that [claimant] should be able to return to that type of activity.¹²

Dr. Barrett testified weight limits for sedentary/light duty would be 5 pounds frequently and 10 pounds occasionally. Dr. Barrett believed claimant was capable of working full-time as long as he had the flexibility to move around and stay within her restrictions.¹³

On May 3, 2013, a review and modification Award was entered finding claimant was permanently and totally disabled, and awarding benefits not to exceed \$125,000. The review and modification Award noted that Dr. Robl, who had more contact with claimant, was more persuasive than Dr. Barrett. The administrative law judge noted respondent's request for reimbursement from the Kansas Workers Compensation Fund for money paid for claimant's Aciphex prescription was "not the subject of this review and modification and is not properly before the court."¹⁴ Respondent's appeal followed.

¹¹ The review and modification Award states that Dr. Barrett examined claimant only twice.

¹² Barrett Depo., Ex. 2 at 1-2.

¹³ *Id.*, at 10-11.

¹⁴ ALJ Review & Modification Award (May 3, 2013) at 2.

PRINCIPLES OF LAW

It is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹⁵ "Burden of proof" is the "burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹⁶

K.S.A. 44-510c (Furse 1993) provides, in part:

(a)(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. . . .

An injured worker is permanently and totally disabled when he is "essentially and realistically unemployable."¹⁷

K.S.A. 44-528 (Furse 1993) states:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

. . .

¹⁵ See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

¹⁶ K.S.A. 1999 Supp. 44-508(g).

¹⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993). Despite arguably providing a definition of permanent total disability that goes beyond the plain language of K.S.A. 44-501c, *Wardlow* is cited favorably in *Henson v. Belger Cartage Services, Inc.*, No. 107,026, 281 P.3d 180 (Kansas Court of Appeals unpublished opinion filed July 20, 2012, *rev. denied* Sep. 4, 2013).

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

A review and modification award is an entirely new award, separate and distinct from the underlying award it modifies. The same legal principles controlling an initial award of compensation generally apply to an award under the modification and review statute.¹⁸

K.S.A. 1999 Supp. 44-534a(b) states:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund . . . for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to . . . as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

A full hearing, as used in K.S.A. 44-534a(b), is “an exploration of the issues resulting in the ultimate decision, e.g., whether the claimant is entitled to workers compensation benefits. It includes a situation where there has been an evidentiary hearing before the administrative law judge”¹⁹

K.S.A. 1999 Supp. 44-551(b)(1) states, in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

¹⁸ *Quandt v. IBP*, 38 Kan. App. 2d 874, 878, 173 P.3d 1149, 1152 (2008).

¹⁹ *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, Syl. ¶ 1, 104 P.3d 378, 380 (2005).

“The passage of time in and of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury.”²⁰

In *Bergstrom*,²¹ the Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

ANALYSIS

(1) Claimant is permanently and totally disabled.

Claimant is permanently and totally disabled. He testified that his condition has changed. The court-ordered physician, Dr. Robl, testified that claimant’s low back injury progressively worsened over the years. Dr. Robl indicated claimant is permanently and totally disabled and essentially and realistically unemployable. Among claimant’s various restrictions in 2001, he had a 30 pound lifting limit. His lifting restriction in 2012 was 5-10 pounds; he also needs flexibility to change positions for comfort. This shows a worsening. Claimant did not have a cane or walker in 2001, but does now. That is a change for the worse. Given claimant’s physical and psychological impairments, his sedentary/light duty restrictions, his need to be able to have flexibility to change positions, his lack of formal education and training, as well as his employment history, which primarily consists of physical labor, the Board concludes claimant is permanently and totally disabled. The actual and effective date of the modification is August 6, 2012.

(2) Claimant was not entitled to have respondent pay for his Aciphex prescription; such compensation is totally disallowed.

Regarding the second issue, if a full hearing occurred and the court determines respondent paid for benefits claimant was not entitled to receive, respondent may apply for reimbursement through the Director of Workers Compensation.

Neither the judge nor the Board has the authority to order the Kansas Workers Compensation Fund to reimburse respondent for the cost of claimant’s unrelated medication, Aciphex. That responsibility, by statute, belongs to the Director.

²⁰ *Nance v. Harvey County*, 263 Kan. 542, 550, 952 P.2d 411 (1997).

²¹ *Bergstrom v. Spears Manufacturing. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

A full hearing, within the meaning of *Schmidtlien*, occurred. The issue as to whether claimant was prescribed Aciphex on account of his injury was squarely before the court and litigated. Despite Dr. Robl's testimony, claimant tried unsuccessfully to get Dr. Barrett to testify that his use of Aciphex was related to his 1999 injury. Therefore, it was undisputed that claimant's need for Aciphex was unrelated to his injury. Respondent voluntarily paid for medication that it was not responsible to provide. Such payment was compensation to which claimant was not entitled; such compensation, amounting to \$25,459.18 dating back to late-2005, is totally disallowed and is an overpayment.

K.S.A. 44-528 (Furse 1993) does not limit the judge's jurisdiction in a review and modification proceeding. Respondent need not file a separate application for review and modification. The scope of review on an application for review and modification is not limited to claimant's application.²² As observed in *Quandt*, when deciding a review and modification case, we are producing a new award. The same legal principles for an initial award also apply to a review and modification award. Insofar as a judge would have jurisdiction to address an overpayment when deciding an initial award, the judge would similarly have jurisdiction to address an overpayment following a review and modification hearing.

K.S.A. 44-528 (Furse 1993) does not limit respondent's ability to seek a determination that it voluntarily paid for benefits claimant was not entitled to receive, pursuant to K.S.A. 1999 Supp. 44-534a(b). The former statute's indication that a modification of an award for "functional impairment or work disability" not be effective for more than six months before the application for review and modification was filed does not apply to the prescription overpayment issue.

Finally, the prohibition against certifying a reimbursement unless an employer or employer's insurance carrier makes the request within one year of a final award also does not prohibit respondent from seeking a determination that it voluntarily paid for benefits claimant was not entitled to receive. While the December 7, 2001 Award was certainly a final award, the May 3, 2013 review and modification Award is a new final award.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board:

(1) affirms that claimant is permanently and totally disabled; and

(2) modifies the review and modification Award and holds that, following a full hearing, claimant was not entitled to have respondent pay compensation for his Aciphex prescription; such payments, totaling \$25,459.18, are totally disallowed. Respondent may apply for reimbursement through the Director.

²² See *Taber v. Tole Landscape Co.*, 188 Kan. 312, 314, 362 P.2d 17 (1961).

AWARD

WHEREFORE, the Board modifies the May 3, 2013 review and modification Award as indicated in the preceding paragraph.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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